85-2084

Supreme Court U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

HAROLD COFFEY, and JERRY DEAL,
Individually and d/b/a C & D
HARBOR SERVICE; and C & D
HARBOR SERVICE, INC.,

Petitioners,

VS.

JOHN H. PIERSON and his
wife, GYNELLE PIERSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

I. Whether State Property Laws, Including the Law of Trespass, May Interfere With the Federally Guaranteed Right of the Public to Navigate the Mississippi River.

II. Whether State Property Laws, Including the Law of Trespass, May Supercede and Interfere With a Federally Granted License (Afforded by the Corps of Engineers Under the Rivers and Harbors Appropriations Act, 33 USC §401 et seq.) to Maintain Anchor Buoys on the Bed of the Mississippi River for Use in Navigation.

PARTIES TO THE PROCEEDING IN THE STATE COURTS

The following is a list of all parties to the proceeding in the state court whose judgment is sought to be reviewed:

1. Harold Coffey and Jerry Deal, Individually and d/b/a C & D Harbor Service; and C & D Harbor Service, Inc. (Petitioners herein);

2. John H. Pierson and Gynelle Pierson, husband and wife (Respondents herein);

3. Kenneth E. Love, Individually and d/b/a Marine Service (Mr. Love was a co-defendant with Petitioners in the state court proceedings; however, no claims were made by or between the Petitioners and Mr. Love and accordingly Mr. Love has not been made a Respondent to this Petition).

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PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH
OF KENTUCKY COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Harold Coffey and Jerry Deal, Individually, and d/b/a C & D Harbor Service, and C & D Harbor Service, Inc., the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Commonwealth of Kentucky Court of Appeals entered on September 27, 1985, as the

above stated substantial and important federal questions have been incorrectly decided in the court below and should be reviewed by this Honorable Court:

OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The court of first instance herein was the Fulton Circuit Court for the Commonwealth of Kentucky (a court of general trial jurisdiction) and its judgment and memorandum opinion are unreported; an appeal from the trial court was taken to the Commonwealth of Kentucky Court of Appeals and the opinion and decision therein is styled and reported as *Pierson v. Coffey*, Ky. App., 706 S.W.2d 409 (1985); thereafter, a Motion for Discretionary Review was filed in the Supreme Court of Kentucky and the order denying the Motion for Discretionary Review was reported in the case styled *Love v. Pierson; Coffey v. Pierson*, Ky., 706 S.W.2d 408 (1986).

The opinion of the Commonwealth of Kentucky Court of Appeals is printed in Appendix A hereto, *infra*, p. A1 to A15. The judgment of the Fulton Circuit Court for the Commonwealth of Kentucky is printed in Appendix B

hereto, *infra*, p. B1. The memorandum opinion entered by the Fulton Circuit Court is printed in Appendix C hereto, *infra*, p. C1 to C4. The opinion and order denying Motions for Discretionary Review entered by the Supreme Court of Kentucky is printed in Appendix E hereto, *infra*, p. E1 to E3.

JURISDICTION

The judgment of the Commonwealth of Kentucky Court of Appeals (Appendix A, *infra*, p. A1 to A15) was entered on September 27, 1985. A timely Petition for Rehearing was denied by the Commonwealth of Kentucky Court of Appeals by order dated December 6, 1985 (Appendix D, *infra*, p. D1 to D2). A timely Motion for Discretionary Review in the Supreme Court of Kentucky was denied by the Supreme Court of Kentucky on March 20, 1986 (Appendix E, *infra*, p. E1 to E3). The jurisdiction of this Court is invoked under 28 USC §1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This Petition draws into question the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3:

"(The Congress shall have power) to

regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Also involved in this Petition is §10 of the "Rivers and Harbors Appropriations Act," 33 USC §10:

> "... it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, break water, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War (Secretary of the Army)..."

Also involved in this case are provisions of the Code of Federal Regulations dealing with Navigation and Navigable Waters and the Corps of Engineers. 33 CFR §322.3(a) provides:

> "Department of Army permits are required under §10 for structures and/or work in or affecting navigable waters of the United States ..."

33 CFR §322.2 (b) provides:

> "The term 'structure' shall include ... mooring structure."

33 CFR §322.3 (c) (2) provides:

> "Congress has delegated to the Secretary

of the Army and the Chief of Engineers in §10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States."

33 CFR §325.2 (a) (6) provides:

> "... the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a Statement of Findings (SOF) or, where an EIS has been prepared, a Record of Decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest..."

STATEMENT OF THE CASE

The holders of a Federal Corps of Engineers permit authorizing the construction and use of anchor buoys in the Mississippi River are being sued for doing exactly what the Corps of Engineers has authorized: constructing and using anchor buoys.

The Petitioners herein, Harold Coffey and Jerry Deal, Individually and d/b/a C & D Harbor Service; and C & D Harbor Service, Inc., are the assignees and holders of a Department of the Army permit dated May 22, 1980, and effective through May 22, 1983, whereby the Secretary of the Army authorized them to "con-

struct a fleeting area utilizing eight anchor buoys along the left descending bank of the Mississippi and in Hickman Harbor at approximate River Mile 921.8 (Appendix F, *infra*, p. F1 to F2). Based on the authority of this permit, and based on the right of all of the public to use the Mississippi River for navigation, the Petitioners placed rock boulders on the riverbed with mooring cables and anchor buoys attached. The Petitioners then operated a barge fleeting service which provided towing services and overnight anchoring facilities for barges travelling on the Mississippi River.

The respondents, John H. Pierson and his wife, Gynelle Pierson, claim ownership of the shore land opposite the location of the Petitioners' anchor buoys. Because Kentucky state property law adheres to the view that riparian property owners own to the center of the river or stream, the Piersons initiated a suit against the Petitioners claiming damages for trespass. Petitioners' anchors are on the Kentucky side of the "thread of the stream;" however, they are 75-100 feet

off shore. (Appendix F, *infra*, p. F11)

(A contract dispute is also involved among the claims brought by the Piersons, but the contract claim is merely collateral to the trespass claim. This contract dispute, which involves an agreement for renting the actual above water riverbank land owned by the Piersons, is not involved in this Petition, and does not raise any federal questions.)

Important federal questions are involved in this case because the Commonwealth of Kentucky Court of Appeals has decided that even the slightest and most insignificant interference with a riparian landowner's property rights takes precedence over and is paramount to the rights of public users of navigable waterways and the rights of holders of Corps of Engineers navigation permits.

The federal questions involved in this case were raised in defense to the trespass claim in the Fulton Circuit Court, a court of general jurisdiction in the Commonwealth of Kentucky. Specifically, the Piersons claimed that the placement of anchor buoys using submerged boulders on the riverbed by the Petitioners constituted an actionable trespass. The Petitioners generally denied that a trespass

had occurred. At the trial court level, the Petitioners herein raised their federal questions in two ways. First, in support of jury instructions tendered by Petitioners, it was specifically argued that Petitioners were entitled to construct and use their anchor buoys by virtue of rights held by all citizens under the Commerce Clause and the navigation authority of Congress; and additionally, by virtue of a specific Corps of Engineers permit granted to Petitioners under 33 USC §401 et seq. (Appendix G, *infra*, p. G1 to G4). Further, pretrial motions for summary judgment were filed by all of the parties, which under local practice establishes that there are no material issues of fact, and that the trial judge may decide the controversies as a matter of law. In support of their motion for summary judgment, the Petitioners again raised their federal questions in their "Supplemental Authorities in Support of Defendant, C & D Harbor Service, Inc.'s Motion for Summary Judgment" (Appendix H, *infra*, p. H1 to H4.)

Included in the factual record before the trial court was the deposition testimony of David Pitts, engineer with the United States Army Corps of Engineers. Mr. Pitts based

his testimony on 28 years of experience with the Corps of Engineers, including 12 years in the regulatory branch. While performing his duties in the regulatory branch, Mr. Pitts was directly involved in the permit process for the Corps of Engineers permit ultimately granted to the Petitioners herein. In the following manner, Mr. Pitts testified that the Petitioners' permits were validly issued and that they were issued to promote the public's interest in navigation of the Mississippi River:

"A. Mr. Love obtained permits from us.

Q. Did he make application for those permits?

A. Yes.

Q. Would you describe briefly what the permit application consists of, how a person goes about applying for a permit?

A. Yes. We have a form that they fill out. They submit drawings along with the forms to be issued with a public notice. We issue the public notice and then make a public interest review to determine whether or not the permit is issued.

Q. Now, this public interest review, what does that consist of?

A. It consists of a number of different items that we discuss in our assessments and statement of findings in determining whether it's in the

public interest to issue the permit.

Q. What are those issues that you discuss?

A. I can't name them all. I can name part of them.

Q. Name part of them.

A. Navigation is one. How many do you need?

Q. As many as you can think of.

A. I better not try to name them all. There's about 20 or 25 of them.

Q. The major ones, then.

A. Navigation is one, that would be major. Flood control is another one. Anything that might do to the environment concerning fish and wildlife or endangered species, and we also look at cultural resource values. That's primarily the basics.

Q. Were those looked at in regard to the issuance of the permits for Mr. Love?

A. Yes. (Pitts' depo., p. 8 - 10)

. . . . . .

Q. You have answered in a question that these anchors and the anchor buoys are an aid to navigation. Is that what you're saying?

A. As far as I know, yes, sir. (Pitts' depo., p. 88)

In concise summary, the evidence in the trial record demonstrates that the Petitioners obtained a Corps of Engineers permit after the Corps conducted public

hearings, assessed the public interest, and after the Corps determined that it was in the best interests of navigation to permit the Petitioners to place their anchor buoys in the Mississippi River opposite the Piersons' shoreline. The Corps of Engineers was acting pursuant to 33 CFR 322.1 et seq., *supra*, the authority for which is found under the Rivers and Harbors Appropriations Act, 33 USC §401 et seq., *supra*, which Congress enacted pursuant to its powers and authority under the Commerce Clause, *supra*.

The trial court in ruling on summary judgment weighed the respective rights of the Petitioners under the Corps of Engineers permit and as public users of the Mississippi River against the claimed riparian property rights of the Piersons. Before submitting the case for decision by summary judgment, the Piersons were afforded a full and fair opportunity to establish the nature of their claimed rights and the degree or extent to which their rights were affected by the Petitioners' use of the Mississippi River and the Corps of Engineers permit.

As shown by the summary judgment and memorandum opinion entered by the trial court, a ruling was

made in favor of the Piersons on the question of the breach of contract for use of the shoreline; however, a ruling was made in favor of the Petitioners on the question of the right to use the Mississippi River and the riverbed. The Fulton Circuit Court's judgment in favor of the Petitioners under the Commerce Clause and the Corps of Engineers permit is stated as follows:

> "... In this case, it does not appear that the anchoring of the vessels by C & D Harbor Service has significantly interfered with any riparian rights that the Plaintiffs have exercised or attempted to exercise. The Defendants have not interfered with the Plaintiffs' access to the Mississippi River.
>
> It is the finding of the Court that the Plaintiffs have qualified title in the land under the Mississippi River, that it is held subordinate to such use of the submerged land and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. Therefore, tht portion of the Plaintiffs' complaint seeking additional damages will be denied." (Appendix C, *infra*, p. C2 to C3)

As additionally shown by the opinion of the trial court, the Petitioners were not answerable to a trespass claim because "they had obtained a permit from the Corps of Engineers to place their anchors in the Mississippi River as

required by 33 USC §401 et seq." (Appendix C, *infra*, p. C2)

The trial court's findings of fact that the Piersons' property rights had not been significantly interfered with, and that their access to the river had suffered no interference, are findings of fact which the Piersons have never challenged and which have not been disturbed by any appellate court in Kentucky.

Having lost on their trespass claim, the Piersons then appealed to the Commonwealth of Kentucky Court of Appeals (which in the Kentucky court system is an intermediate appellate court). Once again, the Piersons argued that their rights as riparian landowners were superior to the rights of the Petitioners, and that Kentucky property law would permit them to sue the Petitioners for trespass and to eject the Petitioners from their location on the Mississippi River. The Petitioners further preserved the federal questions involved herein by arguing before the Court of Appeals that their standing as public users of the Mississippi River and their additional standing as holders of a Corps of Engineers permit protected them from the Piersons' trespass claims. (Appendix I, *infra*, p. I1 to I5)

The Commonwealth of Kentucky Court of Appeals reversed the Fulton Circuit Court's rulings on the federal questions. In deciding the first federal question, which is whether the Petitioners' use of anchor buoys was protected under the public's right of navigation, the Court of Appeals admitted having considerable difficulty in resolving the question. The very first sentence of the court's opinion announces: "This is a case of first impression" (Appendix A, *infra*, p. A2). Then the court noted that the issue was "troublesome because relevant authorities from this and other jurisdictions have not had occasion to address it" (Appendix A, *infra*, p. A5). Then the court stated: "The issue of whether the particular activities complained of in the instant action are included within the scope of the 'public right of navigation' has never been addressed in a reported case" (Appendix A, *infra*, p. A6). Without any reference to the fact that Congress has delegated to the Corps of Engineers the authority to determine what is and what is not "navigation," the court decided tht the Petitioners' use of boulder-type anchor buoys was not "navigation:" therefore, Petitioners' use of their anchor buoys was not pro-

tected under federal law. That is to say, the court determined that use of anchor buoys was not included within "the public right of navigation." (Appendix A, *infra*, p. A7 to A9)

The court then addressed and considered the second federal question; that is, whether the issuance of a federal permit to the Petitioners made the Petitioners' use of the anchor buoys lawful. The court concluded that the Corps of Engineers permit did not authorize Petitioners to place the anchor buoys on the Piersons' property without the Piersons' consent. The court stated:

> "The requirement that a person must obtain a permit before he or she may place obstructions in the River does not confer any interest in riparian property upon the recipient of the permit. *Rather, its requirement merely safeguards the public right of navigation by insuring that there will be proper regulation and placement of any obstructions submerged in navigable waters.*" (Appendix A, *infra*, p. A10). (emphasis added)

The irony and inconsistency of the court's reasoning is manifestly clear. In the first instance, the court decided that use of anchor buoys had nothing to do with "the public right of navigation." In the second instance, the court

concluded that the Corps of Engineers permit, which the Petitioners held, safeguarded the "public right of navigation."

The obvious thrust and ultimate result of the Court of Appeals decision is that the Piersons' property rights take precedence over the federal navigation servitude and over public interest permits issued by the Corps of Engineers, even though the extent of interference with the Piersons' property rights is *insignificant*.

A Petition for Rehearing in the Commonwealth of Kentucky Court of Appeals was denied by the court (Appendix D, *infra*, p. D2.) Thereafter, a Motion for Discretionary Review was filed by the Petitioners in the Supreme Court of Kentucky; however, this motion was likewise denied (Appendix E, *infra*, p. E2). Petitioners have exhausted all of their avenues of appeal of the federal questions within the Kentucky state court system.

By virtue of the opinion and judgment of the Commonwealth of Kentucky Court of Appeals, the Petitioners now face a trial on damages for exercising their rights as members of the public to use a navigable waterway of the United

States, and for exercising their rights as the holders and owners of a permit from the Corps of Engineers to construct an anchoring area in the Mississippi River.

It is respectively submitted that the decisions on the federal questions involved herein are sufficiently "final" to justify the Court's exercise of jurisdiction herein. Even though a damage trial has been ordered in the state courts, the federal questions have been fully litigated and the facts surrounding the federal questions have been fully determined in the state courts. Under well-established principles, the federal questions are presently "ripe" for decision by this Court. *See e.g. NAACP v. Claiborne Hardware*, , 488 U.S. 886, 73 L.Ed. 2d 1215, 102 S.Ct. 3409 (1982); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 43 L.Ed. 2d 328, 95 S.Ct. 229 (1975).

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. *The State Court Has Decided An Important Question Concerning The Federal Navigation Servitude In A Way That Conflicts With Decisions Of This Court.*

Unless this Petition is granted, the state property law

of Kentucky will threaten the public's traditional use of the Mississippi River, Ohio River, Tennessee River, Cumberland River, Green River, Kentucky River, and Licking River -- all commercially navigable waterways of the United States -- which happen to run along the shorelines of local riparian landowners in Kentucky. The threat of lawsuits by riparian landowners against public navigators -- which the state court decision in this case authorizes -- is based on a ruling which is contrary to the most venerable teachings of this Court concerning the rights of the public to use our great natural water highways.

Early in the history of this Court, it was determined and established that the federal power to regulate commerce necessarily includes the power over navigation. *Gibbons v. Ogden*, 9 Wheat 1, 189, 6 L.Ed. 23 (1824).

The Commerce Clause confers a unique position upon the federal goverment in connection with navigable waters:

> "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States ... For this purpose, they are the public property of the nation, and

subject to all the requisite legislations by Congress." *Gilman v. Philadelphia*, 3 Hall 713, 724 -725, 18 L.Ed. 96, 99 (1866).

The public's right to use navigable waters, as protected under federal law and the Commerce Clause, has always been held to be superior and paramount to the rights of local property owners:

> "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no rights of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L.Ed. 126, 21 S.Ct. 48 (1900).

It has additionally been held by this Court that: "The running water in a great navigable stream is (incapable) of private ownership..." *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69, 57 L.Ed. 263, 33 S.Ct. 667. (1913)

See also United States v. Twin City Power Co., 350 U.S. 222, at 228, 100 L.Ed. 24, 76 S Ct. 259 (1956).

More recently, in *Kaiser Aetna v. United States*, 440 U.S. 164, 62 L.Ed. 2d 332, 100 S.Ct. 383 (1979), this Court stated:

> "The navigation servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce" 440 U.S. at 177.

The Court has held that the power to regulate navigation confers upon the United States a "dominant servitude," which extends to the *entire stream* and the *stream bed* below the ordinary high-water mark. *FPC v. Niagra Mohawk Power Corp.*, 347 U.S. 239, 249, 98 L.Ed. 666, 675, 74 S.Ct. 487 (1954).

The public's rights under the navigation servitude include not only the use of the water, but also the use of the riverbed:

> "If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include

> the right to use the bed of the water for every purpose which is in aid of navigation" *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 87, 57 L.Ed. 1083, 33 S.Ct. 679 (1913).

It is with this last fundamental statement of constitutional principle that the decision of the Commonwealth of Kentucky Court of Appeals directly conflicts. The public's rights under the navigation servitude are not limited to actually plying the waters and momentarily anchoring. Instead, this Court has clearly and long ago established that the public's right to use the bed of the river *is for every purpose which is in aid of navigation*, and that this right is dominant to any claimed property right of a riparian landowner.

The factual record in this case clearly establishes that the Petitioners' use of anchor buoys, to which barges traveling the Mississippi may tie up overnight, *is in aid of navigation.* The Corps of Engineers, after a full public hearing and public interest administrative proceeding, determined that the Petitioners' anchor buoys were "in aid of navigation." The testimony of the Corps of Engineers' representative engineer, Mr. Pitts, is likewise unchallenged

and unequivocal that Petitioners' anchor buoys are an "aid to navigation." (Pitts depo., p. 88)

It is therefore respectfully submitted that the Court of Appeals decision that Petitioners' anchor buoys are not protected under the "public right to navigation" is clearly contrary to the well-established principles and decisions of this Court.

It is certainly not surprising that the Court of Appeals would find no cases as authority for its ruling, and that the court would lament that its decision was difficult and troublesome and lacking in precedent. The obvious reason why the Court of Appeals would find few or no state court decisions as to what constitutes "the public right of navigation" is because the Corps of Engineers, under authority of Congress and the Commerce Clause, has been designated as the agency for deciding what activities are in aid of navigation. State courts have little or no need or prerogative for making this determination.

It is additionally submitted that the test for what constitutes "navigation" is a federal test, not a matter for decision under an *ad hoc* state test. Under any federal test,

anchoring is a part of navigation. A state court decision holding that anchoring is "not navigation" threatens commerce and the federally protected rights of the public to use our rivers for navigation.

This Court should decide whether state courts may determine the types of activities on the rivers for which citizens may be held liable for trespass, especially when an activity has been previously sanctioned and approved by a federal agency responsible for regulating navigation.

As matters presently stand, and if this Petition for Writ of Certiorari is not granted, courts in Kentucky will be bound to follow the reported precedent of the Commonwealth of Kentucky Court of Appeals holding that riparian landowners may sue public users of the navigable waterways bordering on Kentucky riparian lands, and that each state court may decide what constitutes "navigation" in determining whether public users may be sued for trespass (and theoretically, charged with criminal trespass).

2. *The State Court Has Decided An Important Question Concerning The Exercise Of A Federal License In A Way That Conflicts With Decisions Of This Court.*

Under the Commerce Clause, a doctrine was long ago decided and accepted by this Court in the 1851 term in *Pennsylvania v. Wheeling & B. Bridge Co.*, (U.S.) 13 How 518, 566, 14 L.Ed. 249, 269: "No state law can hinder or obstruct the free use of license granted under an Act of Congress."

The present record clearly establishes that the Corps of Engineers, acting under an Act of Congress, granted a permit or license to the Petitioners to construct and locate their anchor buoys in the Mississippi River. A state court has now ruled, however, that the Petitioners may be sued for the very activity which Congress has permitted. The Petitioners may be sued for damages, and in theory, their activities under the federal permit could give rise to criminal prosecution for trespass.

A more direct and clear case of conflict between the federal law and state law could not be presented to the Court. State property law seeks to prohibit that which the federal law has expressly permitted. This case does not present a subtle or difficult case under the Commerce Clause, but rather a direct confrontation of state authority

vs. federal authority.

If traditional Commerce Clause analysis is applied to the conflict, numerous precedents and clear decisions of this Court would call for a holding that the state interest in this matter must give way to the federal regulation.

As recently noted by the Court in *Edgar v. Mite Corp.*, 457 U.S. 624, 73 L.Ed. 2d 269, 102 S.Ct. 2629 (1982):

> The Commerce Clause provides that "Congress shall have Power ... (t)o regulate Commerce ... among the several states." U.S. Const., Art. I, §8, cl. 3. "(A)t least since *Cooley v. Board of Wardens*, 12 How 299 (13 L.Ed. 996) (1852), it has been clear that 'the Commerce Clause ... even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371, 47 L.Ed. 2d 55, 96 S.Ct. 923 (1976), quoting *Freeman v. Hewitt*, 329 U.S. 249, 252, 91 L.Ed. 264, 67 S.Ct. 274 (1946). *See also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 64 L.Ed. 2d 702, 100 S.Ct. 2009 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental ... unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed. 2d 174, 90 S.Ct. 844 (1970), citing *Huron Cement Co. v. Detroit*, 362

> U.S. 440, 443, 4 L.Ed. 2d 852, 80 S.Ct. 813, 78 ALR 2d 1294 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited. *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199, 69 L.Ed. 909, 45 S.Ct. 481 (1925). *See also Pike v. Bruce Church, Inc.*, supra, at 142, 25 L.Ed. 2d 174, 90 S.Ct. 844. At 457 U.S. 640.

The above stated principles do not support the state court's decision in favor of the riparian property owner. It is submitted that there is no legitimate local public interest that supports the decision in favor of the riparian landowner. The riparian property law rule does not protect or promote any health interest under the state police power. *See e.g., Huron Portland Cement Co. v Detroit*, 360 U.S. 440, 4 L.Ed. 2d 852, 80 S.Ct. 813 (1960) (state interest in air pollution control permits some regulation over federally licensed steam vessels).

There is no safety justification to support the State of Kentucky's interference with navigation commerce. *See e.g., Kassel v. Consolidated Freightways*, 450 U.S. 662, 67 L.Ed. 2d 580, 101 S.Ct. 1309 (1981) (state regulations that touch upon safety -- especially highway safety -- are those that the Court has been most reluctant to invalidate. At 450

U.S. 670).

Perhaps there is some police power justification, although it clearly does not arise under health or safety considerations, that could be argued in favor of protecting the interests of a riparian landowner; however, the teachings of this Court clearly instruct that consideration must be given to *weighing* the putative local benefits against the burden placed on commerce. In this regard, it must be kept in mind that the factual record shows that the interference with the Piersons' property rights was *insignificant*, but that the Petitioners' use of the Mississippi River in aid of navigation is *de facto* eliminated and the Corps of Engineers permit is rendered meaningless. It is respectfully submitted that the burden placed on commerce is clearly excessive in relation to the putative local benefit.

It is additionally submitted that the state property law is more than a mere incidental regulation of interstate commerce by the State of Kentucky. It is a direct regulation in contravention of Congress. The Corps of Engineers determined that it was in the best interests of navigation

and in the public interest to grant to the Petitioners a permit to use their anchor buoys. The state law of Kentucky, as interpreted in this case, permits the Piersons under a theory of trespass and property law to totally and completely abrogate Congress's power, the Corps of Engineers' power, and the public's interest. In the case of *United States v. Rands*, 389 U.S. 121, 19 L.Ed. 2d 329, 88 S.Ct. 265 (1967), the Court stated:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States ... For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress' .. This power to regulate navigation confers upon the United States a 'dominant servitude,' ..., which extends to the entire stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject ... Thus without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream ..., or otherwise impair or destroy a riparian owners'

> access to navigable waters ... even though the market value of the riparian owner's land is substantially diminished." 389 U.S. at 123.

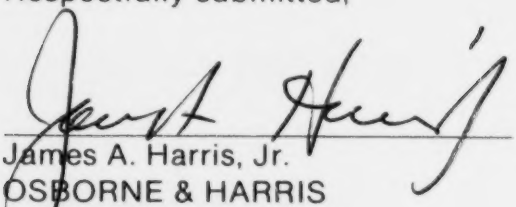
The above stated principles constitute a clearly defined constitutional doctrine which should not be ignored by any state court.

There is absolutely no question that if the Corps of Engineers had placed the very same anchor buoys in the Mississippi River that the Commerce Clause would not permit the Piersons to sue the Corps of Engineers for trespass. By like reasoning, where the Corps of Engineers grants a permit to the Petitioners to place anchor buoys in the Mississippi River as an aid to navigation, the Piersons should not be permitted to sue the Petitioners. It is therefore respectfully submitted that there is no reason or justification or authority for ignoring the long-ago established principle that "no state can hinder or obstruct the free use of license granted under an Act of Congress."

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Commonwealth of Kentucky Court of Appeals.

Respectfully submitted,



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Counsel for Petitioners

APPENDIX

APPENDIX A

JUDGMENT OF THE COMMONWEALTH
OF KENTUCKY COURT OF APPEALS

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

VS.

HAROLD COFFEY, and JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
C & D HARBOR SERVICE, INC.; and
KENNETH E. LOVE, Individually and d/b/a
MARINE SERVICE, Jointly and Severally

Case No. 85-CA-218-MR

AND
HAROLD COFFEY; and JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
and C & D HARBOR SERVICE, INC.

VS.

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

Case No. 85-CA-561-MR

RENDERED SEPTEMBER 27, 1985

OPINION RENDERED: September 27, 1985; 3:00 p.m.

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 85-CA-218-MR

JOHN H. PIERSON, and GYNELLE PIERSON, husband and wife — APPELLANTS

APPEAL FROM FULTON CIRCUIT COURT
V. HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 82-CI-142

HAROLD COFFEY, and JERRY DEAL, Individually and doing business as C & D HARBOR SERVICE; C & D HARBOR SERVICE, INC.; and KENNETH E. LOVE, Individually and doing business as MARINE SERVICE, Jointly and Severally — APPELLEES

AND NO. 85-CA-561-MR

HAROLD COFFEY, and JERRY DEAL, individually and doing business as C & D HARBOR SERVICE; and C & D HARBOR SERVICE, INC. — CROSS-APPELLANTS

CROSS-APPEAL FROM FULTON CIRCUIT COURT
V. HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 82-CI-142

JOHN H. PIERSON; and GYNELLE PIERSON, husband and wife — CROSS-APPELLANTS

AFFIRMING IN PART

AND

REVERSING AND REMANDING IN PART

****

BEFORE: HAYES, Chief Judge, GUDGEL, and WHITE, Judges

GUDGEL, JUDGE: This is a case of first impression. The principal issue is whether a commerical barge fleeting service company, which conducts its business on the Mississippi River by using boulders and anchor buoys placed on the riverbed without the consent of adjacent riparian property owners, may be adjudged liable for damages for trespass. The trial court adjudged that it could not. We disagree with the court's conclusion on this and another issue, although we agree with several of the court's other rulings. Hence, we affirm in part, and reverse and remand in part.

Appellants claim title to riparian property located on the Mississippi River near Hickman in Fulton County. Appellees Coffey and Deal operate a barge fleeting service company (C & D) on the river adjacent to the shore line of appellant's property. C & D's business consists primarily of providing towing services and overnight storage facilities for barges traveling on the river.

On February 15, 1982, C & D entered into a one year lease agreement with appellants. Under the terms of the lease, C & D acquired a right to utilize appellant's shoreline to "tie off" barges which were placed in its overnight care.

However, two months later C & D entered into a separate agreement with appellee Kenneth Love (Love), who had obtained a permit from the Army Corps of Engineers authorizing the placement of anchor buoys. The agreement provided that Love would place several anchor buoys on the riverbed off appellants' shoreline. Further, Love agreed in exchange for a stated consideration that C & D would have the exclusive right to use the buoys for a period of five years. Pursuant to appellees' agreement, Love proceeded to place several twenty- to thirty-ton rock boulders on the riverbed off appellants' shoreline, and attached mooring cables and anchor buoys to them. Appellants did not consent to the placement of the boulders.

C & D commenced utilizing Love's boulders and buoys in the operation of their business. Because of the placement of the boulders, C & D no longer had any need to utilize appellants' shore line for any purpose. On September 24, 1982, therefore, C & D wrote a letter to appellants which expressly repudiated the parties' lease agreement. This action followed.

Appellants sought compensatory damages for breach

of lease and trespass against Coffey and Deal individually, as well as against their corporation, and against Love. They also sought an order requiring apellees to remove the disputed boulders from the riverbed. Appellees defended against the action by claiming that appellants do not have valid title to the portion of the riverbed on which the boulders were placed. The court, however, sustained appellants' subsequent motion to strike this defense, and on March 14, 1984, entered a partial summary judgment against appellees on the issue of liability.

On July 23, 1984, the court entered a final judgment. The court adjudged that Coffey and Deal individually, and their corporation, are jointly liable to appellants for the breach of the 1982 shoreline lease. However, the court reversed summary judgment of March 14, 1984, and adjudged tht although appellants have title to the portion of the riverbed on which Love placed the disputed boulders, their rights as riparian owners are subordinate to appellees' right to utilize the riverbed in aid of navigation. Moreover, because the court concluded there was no evidence that appellees' activities were significantly interfering with

appellants' riparian rights, it also adjudged that appellants are not entitled either to recover damages for trespass, or to require appellees to remove the disputed boulders and anchor buoys. This appeal and cross-appeal followed.

As noted earlier, the principal issue presented on direct appeal is whether the trial court erred by failing to find that appellees' activities have trespassed upon appellants' riparian rights. This issue is troublesome, and the relevant authorities from this and other jurisdictions have not had occasion to address it. However, for the reasons stated hereafter, we conclude that the court erred by finding that appellees may not be adjudged liable for trespass.

This jurisdiction adheres to the view that riparian property owners, such as appellants, own to the center of the stream or river. *Whitson v. Morris*, 304 Ky. 447, 201 S.W. 2d 193 (1946). This riparian right is subordinate, however, to the public's right to utilize navigable waters and to make improvements in aid of navigation. *Commonwealth, Department of Highways v. Thomas*, Ky., 427 S.W. 2d 213 (1968). Appellees argue, since it is clear that appellants have title to the riverbed adjacent to the shoreline on which

the disputed boulders were placed, that the placement of the boulders, and the subsequent use of them to operate a barge fleeting service business, are activities protected by the public's superior "right of navigation." Appellants argue in response that appellees' activities do not fit within any recognized definition of "the public right of navigation," and hence, amount to nothing more than an impermissible trespass upon their riparian property.

As far as we have been able to ascertain, the issue of whether the particular activities complained of in the instant action are included within the scope of the "public right of navigation" has never been addressed in a reported case. Courts in this and other jurisdictions, however, have utilized several general principles to determine whether a given activity falls within the definition of the right. The "public right of navigation" includes the right to navigate the waterways in the strictest sense, that is, for travel and for transportation. *Silver Springs Paradise Co. v. Ray*, 50 F. 2d 356 (C.A. 5th 1931) *cert. denied* 52 S. Ct 29, 284 U.S. 649, 76 L.Ed 551; *see also Warner v. Ford Lumber & Manufacturing Co.*, 123 Ky. 103, 93 S.W. 650 (1906). The right

also includes the right to use the public waterways for recreational purposes such as boating, swimming, and fishing. *Munninghoff v. Wisconsin Conservation Commission,* 255 Wis. 252, 38 N.W. 2d 712 (1949); *Silver Springs Paradise Co. v. Ray, supra.* Moreover, the "public right of navigation," whether for commercial or recreational purposes, necessarily includes the right of temporary anchorage and the right of incidental use of the riverbed. *Hall v. Wantz,* 336 Mich. 112, 57 N.W. 2d 462 (1953); *Munninghoff v. Wisconsin Conservation Commission, supra.*

Appellees rely on these general principles in arguing that any barges traveling the Mississippi River are entitled to utilize appellants' riverbed, without permission, for temporary anchorage purposes. They urge it follows that their particular activites are also protected by this right of temporary anchorage. We have concluded, however, that appellees' argument is fallacious.

Appellees are not themselves engaged in activities which constitute "navigation," as defined by the relevant authorities. Moreover, it is clear that appellees' activities do

not fall within the purview of the public's right to *temporarily* anchor vessels in a navigable waterway. Here, Love dropped boulders on appellants' riverbed in order to provide a *permanent* anchorage facility for C & D's offshore fleeting service business, and to enable him to charge and earn rental fees to be paid by C & D. Further, C & D is not utilizing Love's anchor buoys to temporarily anchor *their own* vessels for recreational or commercial purposes. Rather, they are using them to conduct a commercial business for profit which, in exchange for a fee, makes permanent overnight anchorage facilities available to barges using the river. Thus, the situation in the instant action is factually much different from the typical situation, in which a vessel traveling the river for commercial or recreational purposes drops anchor for some temporary period as an incident of its journey on the river.

The reported case most similar to the instant action is *Hall v. Wantz*, 57 N.W. 2d 462 (Mich. 1953). In that case, the owner of a boat continuously anchored it off of a riparian owners' land, and conducted a fishing business from the vessel. We quote, with approval, the following statements

from the court's opinion in that case:

> (A) riparian owner's property rights to subaqueous lands are subject to an easement in the public for navigation purposes and are subject to the right to anchor as an incident to the right of navigation, nevertheless the right of navigation does not include, as an incident thereto, the right to anchor indefinitely off the riparian owner's premises ...
>
> Defendant, in the instant case, is not confining himself to the exercise of the rights of the public generally to navigation, but goes beyond that to engage in a practice not incident to or part of the right of navigation, namely in permanent or indefinite anchoring of his "ark" to plaintiff's subaqueous lands and keeping the same in waters over such lands for the purpose of conducting business there. *Id.* at 464, 465.

Consistent with these statements, we hold that the activities of appellees Love and C & D are not activities which can reasonably be construed to be within the definitions of the "public right of navigation," as defined in the reported cases. It follows, therefore, that the trial court erred by finding that appellees may not be adjudged liable

for trespass. Hence, the portion of the court's judgment to the contrary must be reversed.

Love further contends that his placement of the boulders was lawful becasue it was authorized by a permit issued to him by the Army Corps of Engineers. We disagree. The requirement that a person must obtain a permit before he or she may place obstructions in the river does not confer any interest in riparian property upon the recipient of the permit. Rather, this requirement merely safeguards the public right of navigation by ensuring that there will be proper regulation and placement of any obstructions submerged in navigable waters. *See, Norfolk Dredging Company v. Radcliff Materials, Inc.*, 264 F.Supp. 399, 402 (1967). Moreover, the permit obtained by Love expressly stated on its face that it did not convey any interest in property. Hence, contrary to Love's contention, it is clear that the permit did not authorize him to place the disputed boulders on appellants' riparian property without their consent.

C & D makes several further arguments in defense of its position that it may not be adjudged liable for trespass.

These arguments depend upon provisions of the parties' 1982 shoreline lease. However, since C & D repudiated the 1982 lease, it is hardly in a position to argue that certain provisions of that lease absolve it from liability.

In light of our conclusions to this point, we need not address appellants' second contention that the court erred by failing to find that appellees are denying them access to their property. Further, we elect not to address appellants' remaining three contentions. CR 76.12 (4) (c) (ii) provides that the "Statement of Points and Authorities" portion of a party's brief shall list "the authorities cited on that point and the respective pages of the brief on which the authorities are cited." Moreover, CR 76.12 (4) (c) (iv) provides that an appellant's brief shall contain an argument "conforming to the Statements of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law." Here, appellants' brief fails to cite any authorities in its "Statement of Points and Authorities" section in support of their remaining three contentions. Further, appellants merely reiterate their "Statement of Points and Authorities" in the argument

portion of their brief and fail to make any argument or cite any authorities to support these contentions. Rather than ordering appellants' brief stricken, however, we have elected not to consider appellants' remaining three contentions as an appropriate penalty to impose for their failure to comply with CR 76.12. *Milby v. Mears*, Ky. App., 580 S.W. 2d 724 (1979).

Appellee Love urged at oral argument that if we reversed the trial court as to the trespass issue, he should be given an opportunity on remand to contest the validity of appellants' title. Appellants' counsel conceded this point. Hence, we also reverse that portion of the court's judgment which adjudges that appellee Love is not entitled to contest the validity of appellants' title. However, we note that in a recent decision of this court we affirmed a judgment upholding the validity of appellants' title. The Kentucky Supreme Court has our decision pending before it on a motion for discretionary review. Appellee Love's right to contest appellants' title on remand, therefore, will depend upon whether the Supreme Court ultimately reverses this court's decision.

On cross-appeal, appellees Coffey and Deal first contend that the trial court erred by adjudging that they are personally liable for the breach of the shoreline lease. We disagree.

The general rule is that one who enters into a contract, for the benefit of a corporation which has yet to be incorporated, remains personally liable in the contract subsequent to incorporation, absent an agreement otherwise. *See,* Annot., 41 A.L.R. 2d 477 (1955); 18 Am.Jr. 2d *Corporations 13) (1965); Kennedy v. Fulton Mercantile Co.*, Ky., 108 S.W. 948 (1908). Here, it is undisputed that Coffey and Deal signed the disputed lease agreement individually a incorporators of C & D Harbor Service, Inc. Therefore, they are jointly and severally liable to appellants for the corporation's breach of the lease. Further, contrary to their contention, we conclude it is of no significance that appellants may have known Coffey and Deal's corporation would take over the lease shortly after it was executed.

Next, Coffey and Deal contend that the trial court erred by failing to allow them to contest the validity of appellants' title. We disagree.

The general rule is that a tenant in possession of property may not dispute the title of his or her landlord. *Campbell v. Hensley*, Ky., 450 S.W. 2d 501 (1970). Moreover, a repudiation or termination of a lease is estopped to deny the landlord's title. *Kentucky-West Virginia Gas Company v. Browning*, Ky., 521 S.W. 2d 516 (1975); *Holton v. Jackson*, 184 Ky. 559, 212 S.W. 587, 590 (1919). Here, it is undisputed that appellees Coffey and Deal and their corporation entered into a landlord-tenant relationship with appellants. Further, they have clearly remained in possession of appellants' riparian property subsequent to their repudiation of the shoreline lease. Thus, they are holdover tenants and as such are estopped to contest the validity of appellants' title.

The court's judgment is affirmed in part, and reversed in part, and this cause is remanded for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

ATTORNEY FOR JOHN H. PIERSON
and GYNELLE PIERSON:

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ATTORNEY FOR KENNETH E. LOVE:

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ATTORNEYS FOR HAROLD COFFEY, JERRY DEAL, and C & D HARBOR SERVICE, INC.:

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APPENDIX B

SUMMARY JUDGMENT
ENTERED BY
COMMONWEALTH OF KENTUCKY
FULTON CIRCUIT COURT

July 23, 1984

COMMONWEALTH OF KENTUCKY
FULTON CIRCUIT COURT
Civil Action No. 82-CI-142

JOHN H. PIERSON, ET AL PLAINTIFFS

VS. JUDGMENT

HAROLD COFFEY, ET AL DEFENDANTS

The Court hereby adopts its Memorandum Opinion of Findings of Fact and Conclusions of Law and incorporates them herein.

IT IS ORDERED that the plaintiffs recover the sum of TWO THOUSAND TWO HUNDRED FIFTY DOLLARS ($2,250.00), and that the complaint be dismissed as to Kenneth Love, d/b/a Marine Service.

This is a final and appealable order.

This 23rd day of July, 1984.

(s) Willard B. Paxton
Special Judge, Fulton Circuit Court

APPENDIX C

MEMORANDUM OPINION OF THE
COMMONWEALTH OF KENTUCKY
FULTON CIRCUIT COURT

CIVIL ACTION NO. 82-CI-142

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

VS.

HAROLD COFFEY AND JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
C & D HARBOR SERVICE, INC.; and
KENNETH E. LOVE, Individually and d/b/a/
MARINE SERVICE, Jointly and Severally

ENTERED ON July 23, 1984

COMMONWEALTH OF KENTUCKY
FULTON CIRCUIT COURT
Civil Action No. 82-CI-142

JOHN H. PIERSON, ET AL PLAINTIFFS

VS. MEMORANDUM OPINION
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

HAROLD COFFEY, ET AL DEFENDANTS

This is before the Court on a motion for Summary Judgment. The Court has previously entered two summary judgments. This litigation has proceeded piece meal ever since. There have been various motions for the Court to reconsider and set aside its other judgments. This action is based upon a lease agreement between the plaintiffs and Harold Coffey and Jerry Deal. The individual defendants Coffey and Deal subsequently incorporated as C & D Harbor Service, Inc., and at a later time Harold Coffey purchased Deal's interest becoming the sole owner of C & D Harbor Service, Inc. The Court has previously held the individual defendants, Coffey and Deal, individually liable and the Court refuses to set aside the judgment and holds Deal and Coffey along with the corporation jointly and severally liable on the lease. *Cincinnati Cooperage Co. vs.*

Bate (Ky. - 1892) 14 Ky. L.R. 469.

It is undisputed that the C & D Harbor Service, Inc. and Coffey and Deal quit paying $500.00 a month as the lease required after September of 1982. This leaves the months of October, November, and December of 1982, and January and one-half of February of 1983 to be covered by the lease. At the rate of $500.00 per month, the defendants are indebted to the plaintiffs in the amount of $2,250.00.

The plaintiffs alleged various other injuries to their property, and the record discloses that certain anchor buoys had been placed in the bottom of the Mississippi River on the east side of the thread of the Mississippi River on land claimed by the plaintiffs. C & D Harbor Service, Inc. later, after breaching their lease with the plaintiffs, contracted with Kenneth Love, d/b/a Marine Service, for a lease. He had procured a permit from the Corps of Engineers to place anchors in the Mississippi River. This is required by 33 U.S.C. §401 et seq. The testimony in this case by discovery deposition has revealed that these anchors weigh some two tons and that in a short period of time they will submerge in the mud and will not be a

hindrance to navigation.

The power to regulate navigation confers upon the United States a dominant servitude which extends to the entire stream and the stream bed below the ordinary high water mark. *United States vs. Rands*, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed. 2d 329 (1967).

There are no Kentucky cases in point as to whether or not the anchorage that has occurred in this case is an infringement upon the plaintiffs' riparian rights. In this case it does not appear that the anchoring of the vessels by C & D Harbor Service has significantly interfered with any riparian rights that the plaintiffs have exercised or attempted to exercise. The defendants have not interfered with the plaintiffs access to the Mississippi River.

It is the finding of the Court that the plaintiffs have qualified title in the land under the Mississippi River, but it is held subordinate to such use of the submerged land and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. Therefore, that portion of the plaintiffs' complaint seeking additional damages will be denied. The plaintiffs will recover of

Harold Coffey, Jerry Deal, and C & D Harbor Service, Inc., jointly and severally, the sum of $2,250.000 representing the balance on the lease. The plaintiffs' complaint as against Kenneth Love, d/b/a Marine Service, is dismissed.

This 23rd day of July, 1984

(s) Willard B. Paxton
Special Judge, Fulton
Circuit Court

APPENDIX D

ORDER OF THE COMMONWEALTH
OF KENTUCKY COURT OF APPEALS
DENYING PETITION FOR REHEARING

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

VS.

HAROLD COFFEY and JEERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
C & D HARBOR SERVICE, INC.; and
KENNETH E. LOVE, Individually and d/b/a
MARINE SERVICE, Jointly and Severally

CASE NO. 85-CA-218-MR

AND

HAROLD COFFEY and JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
and C & D HARBOR SERVICE, INC.

VS.

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

CASE NO. 85-CA-561-MR

ENTERED DECEMBER 6, 1985

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 85-CA-218-MR

JOHN H. PIERSON and GYNELLE PIERSON, husband and wife — APPELLANTS

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 82-CI-142

HAROLD COFFEY and JERRY DEAL, Individually and d/b/a C & D HARBOR SERVICE, INC.; and KENNETH E. LOVE, Individually and d/b/a MARINE SERVICE, Jointly and Severally — APPELLEES

AND NO. 85-CA-561-MR

HAROLD COFFEY and JERRY DEAL, Individually and d/b/a C & D HARBOR SERVICE; and C & D HARBOR SERVICE, INC. — CROSS-APPELLANTS

v. CROSS-APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 82-CI-142

JOHN H. PIERSON and GYNELLE PIERSON, husband and wife — CROSS-APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * * * * * * * * * * * * * * *

BEFORE: HAYES, Chief Judge, GUDGEL and WHITE, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same hereby DENIED.

(s) John D. White
JUDGE, COURT OF APPEALS

APPENDIX E

OPINION AND ORDER OF THE
SUPREME COURT OF KENTUCKY
DENYING MOTIONS FOR
DISCRETIONARY REVIEW

KENNETH E. LOVE, Individually and d/b/a
MARINE SERVICE, Jointly and Severally;
HAROLD COFFEY & JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE;
and C & D HARBOR SERVICE, INC.

VS.

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife

Case No. 85-SC-1094-D

(85-CA-561-MR)

AND

HAROLD COFFEY & JERRY DEAL,
Individually and d/b/a C & D HARBOR SERVICE, INC.

VS.

JOHN H. PIERSON and GYNELLE PIERSON,
husband and wife; and
KENNETH E. LOVE, Individually and
d/b/a MARINE SERVICE

Case No. 86-SC-2-D

(85-CA-218-MR)

ENTERED MARCH 20, 1986

SUPREME COURT OF KENTUCKY
85—SC-1095-D
(85-CA-561-MR)

KENNETH E. LOVE, Individually
& d/b/a MARINE SERVICE, ETC.,
Individually and d/b/a C & D
HARBOR SERVICE and C & D
HARBOR SERVICE, INC. MOVANTS

V. FULTON CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
#82-CI-142

JOHN H. PIERSON AND
GYNELLE PIERSON RESPONDENTS

AND 86-SC-2-D
(85-CA-218-MR)

HAROLD COFFEY & JERRY DEAL,
Individually and d/b/a C & D
HARBOR SERVICE and C & D
HARBOR SERVICE, INC. MOVANTS

V. FULTON CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
#82-CI-142

JOHN H. PIERSON, GYNELLE
PIERSON, and KENNETH E. LOVE,
Individually and d/b/a MARINE
SERVICE RESPONDENTS

OPINION AND ORDER

DENYING MOTIONS FOR DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied, and the opinion of the Court of Appeals is hereby ordered to be published.

The opinion of the Court of Appeals at pp. 9-10 stated:

> "Appellee Love urged at oral argument that if we reversed the trial court as to the trespass issue, he should be given an opportunity on remand to contest the validity of appellants' title. Appellants' counsel conceded this point. Hence, we also reverse that portion of the court's judgment which adjudges that appellee Love is not entitled to contest the validity of appellants' title. However, we note that in a recent decision of this court we affirmed a judgment upholding the validity of appellants' title. The Kentucky Supreme Court has our decision pending before it on a motion for discretionary review. Appellee Love's right to contest appellants' title on remand, therefore, will depend upon whether the Supreme Court ultimately reverses this court's decision.

Discretionary review of the foregoing decision was denied by order of the Supreme Court dated August 28, 1985.

All concur except White, J., not sitting.

ENTERED: March 20, 1986.

(s) Robert F. Stephens
Chief Justice

ATTORNEYS FOR MOVANTS HAROLD
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KENNETH E. LOVE, Individually
and d/b/a MARINE SERVICE:

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APPENDIX F

DEPARTMENT OF THE ARMY PERMIT
GRANTED TO KENNETH E. LOVE
(Assignor to Petitioners Herein)

EFFECTIVE 22 MAY, 1980

WHEREBY THE SECRETARY OF THE ARMY
AUTHORIZED THE CONSTRUCTION OF A
FLEETING AREA UTILIZING EIGHT ANCHOR
BUOYS ALONG THE LEFT DESCENDING BANK
OF THE MISSISSIPPI RIVER AND IN
HICKMAN HARBOR AT APPROXIMATE
RIVER MILE 921.8

(A Copy of Said Permit Being
Exhibited I (a) to the Pretrial
Deposition of Kenneth Love)

DATED MAY 22, 1980

Application No. LMMOD-GP 1522-12 (Miss. River)-190

Name of Applicant Marine Service

Effective Date 22 May 1980

Expiration Date (If applicable) 22 May 1983

DEPARTMENT OF THE ARMY
PERMIT

Referring the written request dated 1 March 1979
for a permit to:
(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, P.L. 92-500);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972. (86 Stat. 1052; P.L. 92-532);

Mr. Kenneth E. Love
Marine Service
P.O. Box 131
Hickman, KY 42050

is hereby authorized by the Secretary of the Army:
to construct a fleeting area utilizing eight anchor buoys

in along the left descending bank of the Mississippi River

and in Hickman Harbor

at approximate River Mile 921.8 AHP

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings: give file number or other definite identification marks.)

Marine Service
Proposed Fleeting Sites
Sheets 1 & 2 of 2

subject to the following conditions:

1. General Conditions

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal prceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (P.L. 92-500; 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1052), or pursuant to

applicable State and local law.

c. That when the activity authorized herein involves a discharge durings its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementat on plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator or the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventive measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice of the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this

permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demostrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with terms and conditions of the permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of

work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not started on or before _____ day of _____, 19 ____ (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before _____ day of _____, 19 ____, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked to specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition thereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all

terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of reality, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. Special Conditions: (Here list conditions relating specifically to the proposed structure or work authorized by this permit):

The following Special Conditions will be applicable when appropriate:

STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

MAINTENANCE DREDGING:

a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for _____ years from the date of issuance of this permit (ten years unless otherwise indicated):

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the FWPCA and published in 40 CFR 230.

b. That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution, and

d. That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

DUMPING OF DREDGED MATERIAL INTO OCEAN WATERS:

a. That the dumping will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

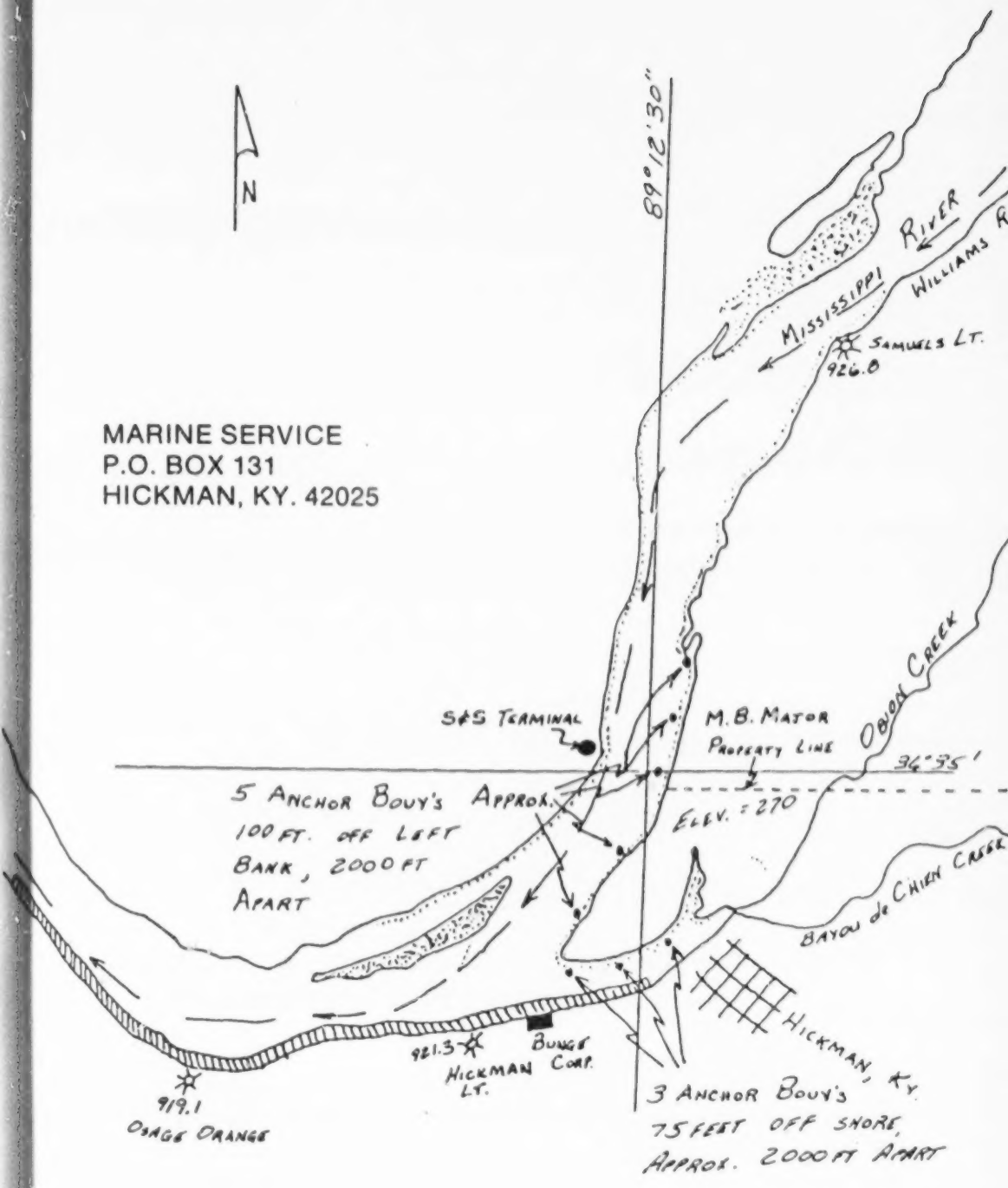
(s) Kenneth E. Love — 5-15-80
PERMITTEE — DATE

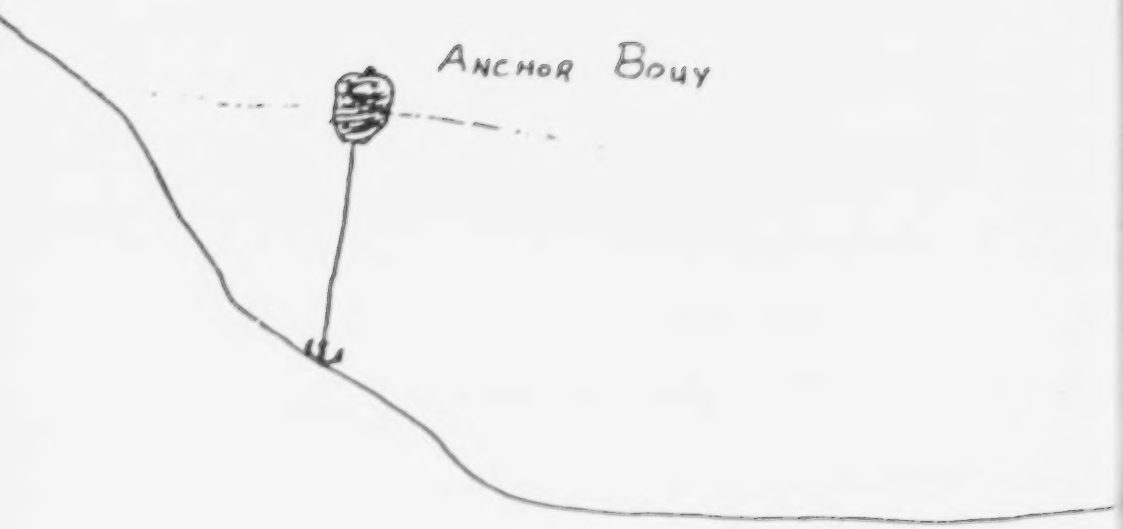
BY AUTHORITY OF THE SECRETARY OF THE ARMY:

(s) WILLIAM H. RENO, Colonel — 5-22-80
DISTRICT ENGINEER, — DATE
U.S. ARMY CORPS
OF ENGINEERS

Transferee hereby agrees to comply with the terms and conditions fo this permit.

Marine Service
Proposed Fleeting Sites
Vicinity Map & Buoy Locations
Sheet 1 of 1





Marine Service
Proposed Fleeting Sites
Typical Buoy Construction
Sheet 2 of 2

APPENDIX G

PORTION OF PETITIONER'S MEMORANDUM IN SUPPORT OF JURY INSTRUCTIONS (Raising Federal Navigation Questions)

Filed With the Fulton Circuit Court on June 12, 1984

5. *The anchoring of a vessel in a navigable stream is a right enjoyed by all citizens.*

Article I, §8 of the United States Constitution provides:

> The Congress shall have the power to . . .
> regulate commerce among the several states.

By virtue of this constitutional power, the federal government has the right and authority to maintain all navigable waters of the United States open for public use.

The Supreme Court has clearly held every body of the navigable water in the United States is a public highway and shall be held open to the public for free and unobstructed navigation. *Transportation Co. v. Chicago*, 99 U.S. 635, _____ S. Ct. _____, 25 L.Ed. 336 (1879).

Every citizen enjoys an equal right to use a navigable stream for all purposes of travel and transportation. *Warner v. Ford Lumber & Manufacturing Co.*, 123 Ky. 103, 93 S.W. 650 (1906).

The right to navigation is paramount to all other property rights belonging to riparian owners. *Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co.*, 209 Ky. 756, 273 S.W. 481 (1925). In particular, the

rights of riparian owners to the bed of a stream are held subject to the dominant right of the public to navigate the waterway. *United States v. Rands*, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed. 2d 329 (1967); and *Natcher v. City of Bowling Green*, 264 Ky. 584, 95 S. W. 2d 255 (1936).

The right to navigate a waterway includes the right to anchor a vessel.*See*, 78 Am. Jur. 2d, *Waters*, §*103, p. 564.*

In Kentucky, the right to navigate includes the right to use the shoreline temporarily. Both of these cases involved the temporary use of a riparian owner's bank incident to navigation. In both cases, the court held such a right existed in order to assure the public's right to navigate the waterway. On the other hand, the use of a riparian owner's bank continuously for commercial profit is not a mere aid to navigation and will constitute a trespass. *Smith v. Atkins*, 110 Ky. 119, 60 S.W. 930 (1901).

As a riparian owner, Pierson enjoys no right to hamper or impede navigation upon the Mississippi River. If riparian land owners were permitted to extract a fee from vessels who chose to anchor over their waters, it would impair the right of navigation.

Congress has delegated to the Corps of Engineers, a Division of the Department of Army, the Power to control all construction and improvements upon the navigable waterways of the United States. 33 U.S.C. §401 et. seq. In that capacity, the Corps of Engineers has granted the defendant, Kenneth Love, a permit to install anchor buoys in aid of navigation. The United States Supreme Court has declared the interest of the federal government in navigable waters extends to the bed of the stream. In *United States v. Rands*, 389 U.S. 121, 88 S. Ct. 265, 19 L.Ed. 2d. 329 (1967), the court held:

> This power to regulate navigation confers upon the United States *dominant servitude . . . which extends to the entire stream and the stream bed* below the ordinary high water mark. (Emphasis added).

The Corps of Engineers' permit does not grant a private property right. However, there is no private property right required in order to operate vessels upon navigable waters.

The operation of vessels frequently requires that they

be anchored and moored overnight. Such an activity is inherent in the use of navigable waters. Barge fleeting operations being conducted in the navigable waters are activities which further the interest of commerce and navigation.

APPENDIX H

PETITIONERS' "SUPPLEMENTAL AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT"

(Raising Federal Navigation Questions)

Filed With the Fulton Circuit Court on June 26, 1984

COMMONWEALTH OF KENTUCKY
FULTON CIRCUIT COURT

JOHN. H. PIERSON, et al,

Plaintiffs,

VS. CIVIL ACTION NO. 82-CI-142

HAROLD COFFEY, et al,

Defendants.

SUPPLEMENTAL AUTHORITIES IN SUPPORT OF DEFENDANT, C & D HARBOR SERVICE, INC.'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's request at the pretrial conference on June 13, 1984, the defendant, C & D Harbor Service, Inc., has attached to its memorandum the following legal authorities:

1. Article I, §8 of the United States Constitution providing in pertinent part "The Congress shall have the power to . . . regulate commerce among the several states . . ."

2. The power to regulate navigation confers upon the United States a dominant servitude which extends to the entire stream and the stream bed below the ordinary high water mark. *United States v. Rands*, 389 U.S. 121, 88 S. Ct.

265, 19 L.Ed.2d 329 (1967).

3. The power to authorize improvements in the stream bed in aid of navigation has been delegated by the Congress of the United States to the United States Department of the Army Corps of Engineers. 33 U.S.C. §401 et seq.

4. The public enjoys a right to use the navigable waters of the United States as a highway, and this right includes the right of anchorage. The right of anchorage extends to commercial vessels as well as recreational vessels, and no cause of action for trespass may be maintained by a riparian owner for anchoring. *People v. Kraemer*, 164 N.Y.S. 2d 423, 433 (1957).

5. The public enjoys a right to use the navigable waters of the United States as a highway, and this right includes the right of anchorage. The right of anchorage extends to commercial vessels as well as recreational vessels, and no cause of action for trespass may be maintained by a riparian owner for anchoring. *Anderson v. Reames*, 161 S.W. 2d 957, 961 (Ark., 1942).

6. The public enjoys a right to use the navigable

waters of the United States as a highway, and this right includes the right of anchorage. The right of anchorage extends to commercial vessels as well as recreational vessels, and no cause of action for trespass may be maintained by a riparian owner for anchoring. *Kuramoto v. Hamada*, 30 Haw. 841, 844 (1929).

7. The public enjoys a right to use the navigable waters of the United States as a highway, and this right includes the right of anchorage. The right of anchorage extends to commercial vessels as well as recreational vessels, and no cause of action for trespass may be maintained by a riparian owner for anchoring. *Munninghoff v. Wisconsin Conservation Commission*, 38 N.W. 2d 712, 716 (Wis., 1949).

8. The public enjoys a right to use the navigable waters of the United States as a highway, and this right includes the right of anchorage. The right of anchorage extends to commercial vessels as well as recreational vessels, and no cause of action for trespass may be maintained by a riparian owner for anchoring. *West v. Smith*, 511 P. 2d 1326, 1331 (Idaho, 1973).

Respectively submitted,

(s) Thomas L. Osborne, P.S.C.
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(502) 444-7216

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(502) 335-5154

COUNSEL FOR DEFENDANT
C & D HARBOR SERVICE, INC.

APPENDIX I

PORTION OF PETITIONERS' BRIEF TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

(Raising Federal Navigation Questions)

Dated February 20, 1985

5. *The anchoring of a vessel in a navigable stream is a right enjoyed by all citizens.*

Article I, §8, of the United States Constitution provides:

> The Congress shall have the power to . . . .
> regulate commerce among the several states.

By virtue of this constitutional power, the federal government has the right and authority to maintain all navigable waters of the United States open for public use. *United States v. Chicago M.S.P. & P.R. Co.*, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064 (1941); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

Every body of navigable water in the United States is a public highway and shall be held open to the public for free and unobstructed navigation. *Transportation Co. v. Chicago*, 99 U.S. 635, _____ S.Ct. _____, 25 L.Ed. 336 (1879).

Every citizen enjoys an equal right to use a navigable stream for all purposes of travel and transportation. *Warner v. Ford Lumber & Manufacturing Co.*, 123 Ky. 103, 93 S.W. 650 (1906).

The right to navigation is paramount to all other property rights belonging to riparian owners. *Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co.*, 209 Ky. 756, 273 S.W. 481 (1925). In particular, the rights of riparian owners to the bed of a stream are held subject to the dominant right of the public to navigate the waterway. *United States v. Rands*, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed. 2d 329 (1967); and *Natcher v. City of Bowling Green*, 264 Ky. 584. 95 S.W. 2d 255 (1936).

The right to navigate a waterway includes the right to anchor a vessel. *See generally*, 78 Am. Jur. 2d, *Waters*, §103, p. 564.

In *People v. Kraemer*, 164 N.Y.S. 2d 423 (1957), the Village of Lloyd Harbor, New York, adopted an ordinance to prohibit boats from anchoring upon the privately owned riparian rights inside the city's harbor. A prosecution was initiated under the ordinance, and the vessel owner defended the action by asserting the right to anchor as an incident to the right of navigation. The court concluded the public's right to navigate included the right to anchor. Therefore, the right to anchor a vessel superseded the right

of the private riparian owners and the city to regulate anchorage.

It was held a vessel owner could permanently anchor his boat upon a navigable waterway by the Hawaii Supreme Court in *Kuramoto v. Hamada*, 30 Haw. 841 (1929). In that case, the operator of an underwater fishery sued to enjoin the owner of a sanpan from permanently anchoring over the underwater fishery. The court held the right of navigation included the right of anchorage and was predominant over the rights of all riparian owners.

The right to anchor incident to navigation has been continuously recognized in the following cases: *Anderson v. Reames*, 161 S.W. 2d 957 (Ark., 1942); *Hall v. Wantz*, 57 N.W. 2d 462 (Mich., 1953); *West v. Smith*, 511 P. 2d 1326 (Idaho, 1973); and *Munninghoff v. Wisconsin*, 38 N.W. 2d 712 (Wis., 1949)

Pierson admits the navigable waters of the Mississippi River are owned by the United States and shall ever remain open to the public for free, unobstructed navigation.

(T.R., 9.) *Pierson admits* the right to navigate a river must, of necessity, include the right to anchor vessels. (Pierson's brief, p. 23.) It is the *method* of anchoring vessels in this case which Pierson claims to violate his riparian rights. The *method* complained of utilized anchor buoys. Rather than individually anchor each vessel, a large boulder connected to a floating buoy is dropped into the river bed. The vessels are then tied directly to the anchor buoy.

Pierson asserts these anchor buoys are "permanent" structures. Not so. In fact, some of the anchor buoys have been moved during the pendency of this litigation. (Transcript of Hearing, 12/14/82, Testimony of Deal, p. 40.) As a matter of fact, the total cost of removing the boulders is only $500.00. (Transcript of Hearing, 12/14/82, Testimony of Love, p. 33).

The irony of Pierson's position is apparent. There is *less* impairment of Pierson's riparian rights by utilizing eight anchor buoys as opposed to a single anchor being placed by 20 separate vessels.

Pierson's brief cites a series of cases dealing with permanent structures, boat houses, wharves, docks and piers. C & D respectively submits that these cases are not dispositive of the issue of anchorage.

APPENDIX J

PORTION OF PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

(Raising Federal Navigation Questions)

Filed With the Supreme Court
of Kentucky on December 23, 1985

3. *The anchoring of a vessel in a navigable stream is a right enjoyed by all citizens pursuant to Article I, Section 8, of the United States Constitution.* Article I, Section 8, of the United States Constitution provides:

> The Congress shall have the power to . . .
> regulate commerce among the several states.

By virtue of this constitutional power, the federal government has the right and authority to maintain all navigable waters of the United States open for public use. *United States v. Chicago M.S.P. & P.R. Co.*, 312 U.S. 592, 61 S. Ct. 772, 85 L.Ed. 1064 (1941); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L.Ed. 243 (1940); and *Ashwater v. Tennessee Valley Authority*, 291 U.S. 288, 56 S. Ct. 466, 80 L.Ed. 688 (1936).

Every body of navigable water in the United States is a public highway and shall be held open to the public for free and unobstructed navigation. *Transportation Co. v. Chicago*, 99 U.S. 635, _____ S. Ct. _____, 25 L.Ed. 336 (1879).

Every citizen enjoys an equal right to use a navigable stream for all purposes of travel and transportation. *Warner*

v. Ford Lumber & Manufacturing Co., 123 Ky. 103, 93 S.W. 650 (1906).

The right to navigation is paramount to all other property rights belonging to riparian owners. *Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co.*, 209 Ky. 756, 273 S.W. 481 (1925). In particular, the rights of riparian owners to the bed of a stream are held subject to the dominant right of the public to navigate the waterway. *United States V. Rands*, 389 U.S. 121, 88 S. Ct. 265, 19 L.Ed. 2d 329 (1967); and *Natcher v. City of Bowling Green*, 264 Ky. 584, 95 S.W. 2d 255 (1936).

The right to navigate a waterway includes the right to anchor a vessel. *See generally*, 78 Am. Jur. 2d *Waters* §103, p. 564.

In *People v. Kraemer*, 164 N.Y.S. 2d 423 (1957), the Village of Lloyd Harbor, New York, adopted an ordinance to prohibit boats from anchoring upon the privately owned riparian rights inside the city's harbor. A prosecution was initiated under the ordinance, and the vessel owner defended the action by asserting his right to anchor as an incident to the right of navigation. The court concluded the

public's right to navigate included the right to anchor. Therefore, the right to anchor a vessel superseded the anchor. Therefore, the right to anchor a vessel superseded the right of the private riparian owners and the city to regulate anchorage.

It was held a vessel owner could *permanently* anchor his boat upon a navigable waterway by the Hawaii Supreme Court in *Kuramoto v. Hamada*, 30 Haw. 841 (1929). In that case, the operator of an underwater fishery sued to enjoin the owner of a sanpan from permanently anchoring over the underwater fishery. The court held the right of navigation included the right of anchorage and was predominant over the rights of all riparian owners.

The right to anchor incident to navigation has been continuously recognized in the following cases: *Anderson v. Reams*, 161 S.W. 2d 957 (Ark., 1942); *Hall v. Wantz*, 57 N.W. 2d 462 (Mich., 1953); *West v. Smith*, 511 P. 2d 1326 (Idaho, 1973); and *Munninghoff v. Wisconsin*, 38 N.W. 2d 712 (Wis., 1949).

Pierson admits the navigable waters of the Mississippi River are owned by the United States and shall ever remain

open to the public for free, unobstructed navigation. *Pierson admits* the right to navigate a river must, of necessity, include the right to anchor vessels. It is the *method* of anchoring vessels in this case which Pierson claims to violate his riparian rights. It is the *method* of anchoring vessels in this case which Pierson claims to violate his riparian rights. The *method* complained of utilizes anchor buoys. Rather than individually anchor each vessel, a large boulder connected to a floating buoy is dropped into the river bed. The vessels are then tied directly to the anchor buoy.

Pierson asserts these anchor buoys are "permanent" structures. Not so. In fact, some of the anchor buoys have been moved during the pendency of this litigation. As a matter of fact, the total cost of removing the boulders is only $500.00

The irony of Pierson's position is apparent. There is *less* impairment of Pierson's riparian rights by utilizing eight anchor buoys as opposed to a single anchor being placed by 20 separate vessels.

85-2084

Supreme Court, U.S.
FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HAROLD COFFEY, and JERRY DEAL,
Individually and d/b/a C & D
HARBOR SERVICE; and C & D
HARBOR SERVICE, INC.,

Petitioners,

VS.

JOHN H. PIERSON and his
wife, GYNELLE PIERSON,

Respondents

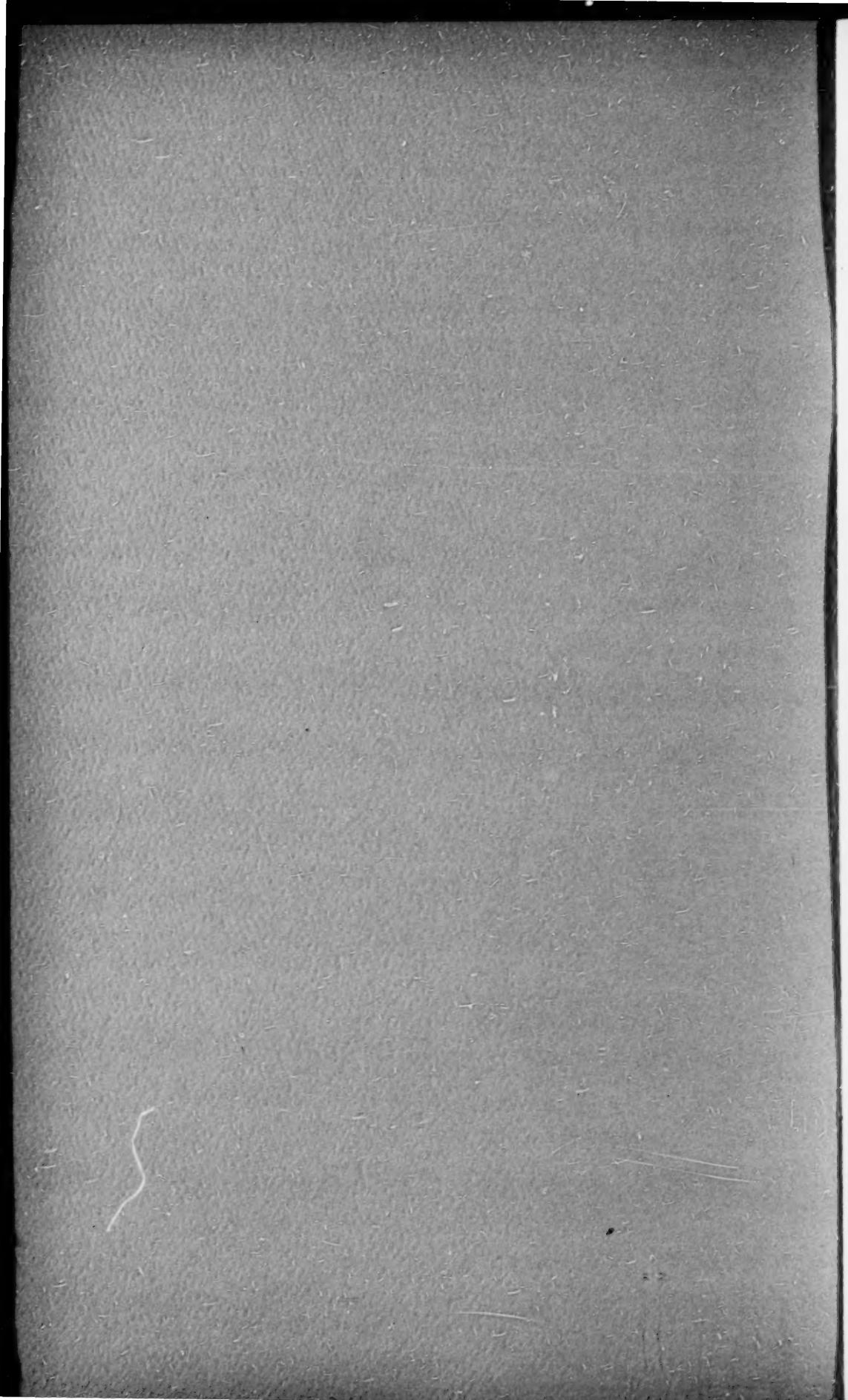
ON WRIT OF CERTIORARI
TO THE COMMONWEALTH
OF KENTUCKY COURT OF APPEALS

RESPONDENTS' BRIEF

J. WILLIAM PHILLIPS
104 North 5th Street
Murray, Kentucky 42071
(502) 753-8900

Counsel for Respondents

25 pp



QUESTIONS PRESENTED

I. Does the Public Right of Navigation Allow:

> A Private Individual, Claiming No Title to Land, to Establish a Permanent Installation in the Submerged Land of a Non-Consenting Riparian Owner for the Private Purpose of Operating a Commercial Barge Storage Business for Profit.

II. May the Corps of Engineers, Having No Title to Such Land, Grant a Right to a Private Individual, Also Claiming No Title to Such Land, to Place Boulders or Other Permanent Anchoring Installations, on the Submerged Land of a Non-Consenting Riparian Owner for the Purpose of Constructing and Establishing a Barge Storage Business Thereon, Especially in View of the Disclaimer Placed by the Corps of Engineers in the "Permit" Which Expressly Denies that Such Permit Conveys Any Property Rights in Real Estate or Authorizes Any Injury to Property or Invasion of Rights.

PARTIES TO THE PROCEEDING IN THE STATE COURTS

The following is a list of all parties to the proceeding in the state court whose judgement is sought to be reviewed:

1. Harold Coffey and Jerry Deal, Individually and d/b/a C & D Harbor Service; and C & D Harbor Service, Inc. (Petitioners herein);

2. John H. Pierson and Gynelle Pierson, husband and wife (Respondents herein);

3. Kenneth E. Love, Individually and d/b/a Marine Service (Mr. Love was a co-defendant with Petitioners in the state court proceeding; Mr. Love was held liable as a trespasser in the State Courts. The Corps of Engineers permit granted to him on May 22, 1980 (a copy of which is set out in the Petition at pages F1-F12) was determined by the Kentucky Court of Appeals to NOT convey any property rights nor authorize Mr. Love to place the disputed boulders on Respondents' riparian property without their consent (Petition at page A10). Kenneth E. Love has chosen NOT to apply to this Court for review of that decision).

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STATEMENT OF THE CASE

Petitioners are conducting a permanent commercial barge fleeting/storage business along the shoreline of the Mississippi River in the State of Kentucky.

Respondents are the adjacent riparian owners and own the submerged land to the thread of the River, under Kentucky law; such ownership, however, is subordinate to the public right of navigation and subject to the absolute power of Congress over the improvement of navigable rivers.

Respondents' position, sustained by the State Apellate Courts of Kentucky, is that the permanent anchorage installations in the riverbed necessary to conduct the equivalent of a floating parking lot, is an activity which is not protected by the public right of navigation.

The Kentucky Court of Appeals' decision from which this application is based (Petition for Writ of Certiorari, hereinafter Petition, Appendix A, pages A8 to A9) adopted the reasoning by the Michigan Supreme Court in *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953):

> " '(A) riparian owner's property rights to subaqueous lands are subject to an easement in the public for navigation purposes and are subject to the right to anchor as an incident to the right of navigation, nevertheless the right of navigation does not include, as an incident thereto, the right to anchor indefinitely off the riparian owner's premises...
> 'Defendant, in the instant case, is not confining himself to the exercise of the rights of the public generally to navigation, but goes beyond that to engage in a practice not incident to or part of the right of navigation, namely in permanent or indefinite anchoring of his "ark" to plaintiff's subaqueous lands and keeping the same in waters over such lands for the purpose of conducting business there. Id. at 464, 465.'
> "Consistent with these statements, we hold that the activities of appellees Love and C & D are not activities which can reasonably be construed to be within the definition of the 'public right of navigation,' as defined in the reported cases."

While the question of the liability of C & D as breaching tenants and Love as a trespasser has been determined by the Appellate Courts of Kentucky, there has been no trial in the lower court as to damages. The trial court has continued the trial of this matter without date, over objection of Respondents.

As to the specific contractual relations of the parties, the detail of the occurrences, and the surrounding

circumstances, Respondents believe that the introduction recited in the Kentucky Court of Appeals decision (Petition, Appendix A, pages A2 through A5) is factually correct and hereby incorporates such recitation.

Respondents take exception to the misinterpretation placed upon the decision of the Commonwealth of Kentucky Court of Appeals on page 7 of the Petition.

Petitioners would have this court believe that a permanent commercial barge fleeting/storage business occupying 2.6 miles along Respondents' shoreline (8 anchor boulders placed 2,000 feet apart, Petition, Appendix F, page F11) and using permanent anchor installations on Respondents' submerged land constitutes only"...the slightest and most insignificant interference with a riparian landowner's property rights..."

Petitioners were tenants of Respondents and breached their agreement by non-payment of rent while continuing to utilize Respondents' submerged land and conducting the same business in the same location.

Petitioners refused to pay further rent to Respondents on the mistaken belief that if Petitioners used permanent

anchor installations for their business which were affixed to *submerged* land, no consent from the riparian owner would be required; and they notified Respondents in writing to that effect. (Clerk's Record on Appeal below, Vol. I, page 26)

Petitioners continuously refer to the Corps of Engineers Permit as being issued or assigned to Petitioners (Petition, page 5 (assigned to Petitioners), 6, 7 (Petitioner is holder of permit), 8 (permit granted to Petitioners), 9 (permit granted to Petitioners), 10 (Petitioners obtained permit), 11 (Corps permitted Petitioners to place anchor buoys) (trial court weighed Petitioners rights under permit), 12 (Petitioners had obtained a permit from the Corps to place their anchors), 13 (Petitioners as holders of a Corps permit), 15 (permit issued to Petitioners)).

Respondents would note that the Corps of Engineers Permit, to which Petitioners lay great stress, was granted to one Kenneth E. Love d/b/a Marine Service a defendant in the lower court. (See Petition, Appendix F, Pages F1 through F12.)

Mr. Love has decided not to apply to this Court to review the question of whether his Permit grants him property

rights to conduct his private business on the property of another.

The permittee was Mr. Love as is apparent on the face of the Permit itself and no evidence of an assignment or transfer to Petitioners exists.

Petitioners state on page 14 of the Petition that it is a "...fact that Congress has delegated to the Corps of Engineers the authority to determine what is and what is not 'navigation'..."

No authority for usurping such a judicial function was or could be offered by Petitioners.

Absent an assignment, Petitioners have no standing to raise the hypothetical issue of what rights, if any, a Corps of Engineers Permit grants to a permittee or assignee.

Finally, Petitioners claim to be unable to comprehend how it is possible for the Kentucky Court of Appeals to conclude that Petitioners' permanently anchored floating parking lot is not a use within the "public right of navigation" and at the same time say that the purpose of a Corps of Engineers permit is to safeguard the public in exercising their (the public's) right of navigation.

The conclusion reached by Petitioners is that if their business activity is not a use permitted under the public right of navigation, it necessarily follows that the public right of navigation has disappeared in its entirety.

On a more realistic note, however, as stated succinctly by the Kentucky Court of Appeals: (Petition, Appendix A, pages A7 to A8)

> "Appellees (C & D, petitioner herein) are not themselves engaged in activities which constitute 'navigation,' as defined by the relevant authorities. Moreover, it is clear that appellees' activities do not fall within the purview of the public's right to temporarily anchor vessels in a navigable waterway. Here, Love dropped boulders on appellants' riverbed in order to provide a permanent anchorage facility for C & D's offshore fleeting service business, and to enable him to charge and earn rental fees to be paid by C & D. Further, C & D is not utilizing Love's anchor buoys to temporarily anchor their own vessels for recreational or commercial purposes. Rather, they are using them to conduct a commercial business for profit which, in exchange for a fee, makes permanent overnight anchorage facilities available to barges using the river. Thus, the situation in the instant action is factually much different from the typical situation, in which a vessel traveling the river for commercial or recreational purposes drops anchor for some temporary period as an incident of its journey on the river."

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. *The Petition for a Writ of Certiorari Is Premature Since the Trial On Damages Has Yet To Be Held*

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67, 92 L.Ed. 1712, 68 S.Ct. 972 (1948) is in point as to this issue:

> "Thus the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce v. Tobin*, 245 U.S. 18; *Martinez v. International Banking Corp.* 220 U.S. 214, 223; *Mississippi Central R. Co. v. Smith*, 295 U.S. 718." (See also *Georgia Railway Co. v. Decatur*, 262 U.S. 432, 437, 43 S.Ct. 613, 26 L.Ed. 1065 (1923))

Respondents are unaware of the federal questions that Petitioners may raise at the trial on damages but with initiative and imagination, a second climb up the appellate ladder by Petitioners can be foreseen.

In four years of this landlord-tenant litigation, Respondents have been denied judgement for rent, damages, and attorney fees as provided in the lease agreement. To grant the application for a Writ of Certiorari

prior to a final determination unduly interferes with concluding this state litigation.

2. *The Holder of the Corps of Engineers Permit, Kenneth Love, Has Elected Not To Appeal the State Court Decision That His Permit Does Not Grant Him Any Property Rights in Submerged Land, And Petitioners Should Not Be Allowed To Raise Such Defense in Love's Behalf.*

As the Kentucky Court of Appeals stated in the instant case:

> "However, two months later C & D entered into a separate agreement with appellee Kenneth Love (Love), who had obtained a permit from the Army Corps of Engineers authorizing the placement of anchor buoys. The agreement provided that Love would place several anchor buoys on the riverbed off appellants' shoreline. Further Love agreed in exchange for a stated consideration that C & D would have the exclusive right to use the buoys for a period of five years. Pursuant to appellees' agreement, Love proceeded to place several twenty- to thirty-ton rock boulders on the riverbed off appellants' shoreline, and attached mooring cables and anchor buoys to them. Appellants did not consent to the placement of the boulders." (Petition, Appendix A, page A3)

In any event the Kentucky Court of Appeals held that the Corps of Engineers Permit did not convey any property right. As stated by that Appellate Court:

"Love further contends that his placement of the boulders was lawful because it was authorized by a permit issued to him by the Army Corps of Engineers. We disagree. The requirement that a person must obtain a permit before he or she may place obstructions in the river does not confer any interest in riparian property upon the recipient of the permit. Rather, this requirement merely safeguards the public right of navigation by ensuring that there will be proper regulation and placement of any obstructions submerged in navigable waters. See, *Norfolk Dredging Company v. Radcliff Materials, Inc.* 264 F.Supp. 399, 402 (1967). Moreover, the permit obtained by Love expressly stated on its face that it did not convey any interest in property. Hence, contrary to Love's contention, it is clear that the permit did not authorize him to place the disputed boulders on appellants' riparian property without their consent."

Or, as more succinctly stated by trial judge, Willard Paxton:

"That Corps of Engineers Permit didn't mean diddly squat."
(Transcript of Hearing on December 14, 1982, page 17)

3. *The Decision That A Private Individual Claiming No Title to Land Has No Right to Establish Permanent Commercial Installations in the Submerged Land of a Riparian Owner for the Private Purpose of Operating a Barge Storage Business for Profit Is Consistent With All Reported Federal and State Decisions.*

a. The title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the riparian owners, depending upon the local law. *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62, 57 L.Ed 1063, 1075, 33 S.Ct. 667, 672 (1913)

b. In the Commonwealth of Kentucky, a riparian owner owns the land to the thread of the stream. *Whitson v. Morris,* Ky., 201 S.W.2d 193 (1946); *Hough v. Ohio Rivers Sand Company,* Ky., 288 S.W.2d 655 (1956); *Wilson v. Watson,* Ky., 132 S.W. 563, 141 Ky. 324 (1910); *Berry v. Snyder,* Ky., 3 Busch 266, 66 Ky. 266 (1867); *Barr v. Spalding,* D.C.W.D. Ky., 46 F.2d 798, 799 (1928); Trial Court Judge Paxton, Transcript of Hearing on December 14, 1982, pages 15, 39-40; Transcript of Hearing of February 1, 1984, page 14

c. The title of the riparian owner to the bed of a navigable stream is a qualified one, and subordinate to the public right of navigation and subject to the absolute power of Congress over the improvement of navigable rivers. *United States v. Chandler-Dunbar Water Power Co.,* supra; Trial Court Judge Paxton, Clerk's Record on Appeal below, Vol. VI, page 824

Natcher v. City of Bowling Green, Ky., 95 S.W.2d 255, 257 (1936): "In and on a navigable stream, the title of a riparian owner...particularly of the bed...is a qualified one, for it is subject to the dominant rights of the public in the stream. Navigable rivers are and always have been regarded as public highways."

Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co., Ky., 273 S.W. 481, 482, 209 Ky. 756 (1925): "The use of navigable streams is analogous to that of the use of public highways, and, concededly, the right of navigation is paramount to any other rights that may be acquired in the use of such streams."

d. This riparian right is a valuable property right and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law; and if necessary that it be taken for the public good, upon due compensation. *Yates v. Milwaukee,* 10 Wall. 497.

e. Federal and state decisions from other jurisdictions are consistent with the holding of the Kentucky Court of Appeals in the instant case:

Boathouses held in floating position by anchors in submerged land, held to be a trespass on submerged land owned by riparian owner. *Steel Creek Development Corporation v. James,* N.C. App., 294 S.E.2d 23 (1982)

"Owner of the bed of a river is certainly entitled to prevent permanent structures on the surface of the water which preclude other uses of the bed, whether or not they actually rest on the bed itself." *Brusco Towboat Co. v. Oregon,* Or., 589 P.2d 712 (1978)

In Illinois, a contractor anchored a spud barge on the bed of the river for the purpose of extended construction without permission of the riparian owner. The Federal District Court held that such a use was not within the navigational servitude and constituted a trespass upon the submerged land of the riparian owner. The Court stated specifically that a riparian landowner holds exclusive mooring and wharfing rights incident to the ownership of title to the middle of the

main channel of the Mississippi River. *Fruin-Colnon Corp. v. Vogt,* USDC, SD Ill., 500 F.Supp. 606 (1980)

In the California case of *County of Marin v. Roberts,* Ca. App., 84 Cal. Rptr. 425 (1970) defendant maintained drydocks on submerged land of a non-consenting owner, claiming its drydocks were within the public right of navigation and also that defendant had received a permit from the Corps of Engineers.

At page 430 the Court stated:

> "Wise's contention overlooks the fact that *even if the Corps of Engineers had issued a permit here, such a permit would in no way inhibit the rights of the property owner, the County, from ejecting Wise as a trespasser.* A Corps of Engineer's permit *merely safeguards the public right of navigation - it does not confer any interest in property. (Norfolk Dredging Company v. Radcliff Materials, Inc.,* D.C., 264 F.Supp. 399, 402). Similarly, the anchorage permits issued by the Coast Guard relate only to promoting safe navigation and confer no property interest (33 C.F.R. 110.214, pages 347-348)." (emphasis supplied)

To the same effect is the Oregon case of *State v. Graham,* Ore., 26 P.2d 46 (1933) at page 52:

> "The license which the United States engineer issued to Barbey (pursuant to 33 USCA 403; 30 Stat. 1151) authorizing him to proceed with the construction of the wharf was a mere declaration that

> the structure would not interfere with or be detrimental to navigation, and was not a declaration by authority of Congress that he could erect the wharf without first obtaining authority from the state of Oregon (cases)."

In *Driesbach v. Lynch,* Id., 234 P.2d 446 (1951), the Idaho Supreme Court held that since the title to the bed of a navigable lake was not vested in the United States, the Secretary of War could not grant rights to third parties to maintain docks and pilings within the littoral boundaries of another littoral owner, thereby interfering with the rights of such littoral owner, and the permit issued by the Secretary was inadmissible as evidence to defend against trespass.

The State of Wisconsin has also expressed its position with respect to what is and what is not "navigation."

After stating the rule in Wisconsin that the owner of the banks of the stream is the owner of the bed, the Court in *Munninghoff v. Wisconsin Conservation Commission,* Wis., 38 N.W.2d 712, 255 Wis. 252 (1949) stated:

> "In general, the rights of the public to the incidents of navigation are boating, bathing, fishing, hunting and recreation (citations) ...Appellant asserts that float trapping does not require the use of the bottom. However, floats for float trapping are always anchored to the bottom and any method of anchoring or securing a float would, of necessity,

require the use of land on the bottom...To float trap in navigable water constitutes a trespass upon the submerged land for which the trespasser may be prosecuted by the owner of the said land and enjoined from using public water for that purpose...

"Appellant also asserts that the right of navigation includes the incidental use of the bottom. This is true where the use of the bottom is connected with navigation, such as walking as a trout fisherman does in a navigable stream, boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc. These have nothing in common with trapping because the latter involves the exercise of a property right in the land or bottom."

This Court, in an extensive opinion, stated in *St. Anthony Falls Water Power Company v. St. Paul Water Commissioners,* 168 U.S. 349 (1897) at 364:

"In *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co.,* 142 U.S. 254 (1891), Mr. Justice Brown, in delivering the opinion of the court, said at page 271: 'It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream is navigable, *to the right of the public to its use as a public highway for the passage of vessels* (citing cases). In *City of Janesville v. Carpenter,* 77 Wisconsin, 288, 300, it is said of the riparian owner: He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, ...Subject to these restrictions, *he has the right to use his land under water the same as above water.* It is his

private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' " (emphasis supplied)

A recent Wisconsin case, very similar on its facts to the instant situation is *Wisconsin v. Bleck,* Wis., 388 N.W.2d 492 (1983) in which a non-riparian owner claimed the right to maintain anchors in the bed of a navigable lake for the purpose of mooring a water ski jump. The discussion of the Wisconsin Supreme Court appears on page 498:

> "*The only use of the water that was regulated in this case was one dependent upon a structure secured to the lake bottom.* Through the enforcement of sec. 30.12, *the state seeks not to preclude the petitioners' recreational use of Bass Lake but only to control petitioners' unauthorized placement of a structure on the bed of a navigable lake.* The fact that the state's regulation of the use of the lake bed pursuant to its authority under sec. 30.12 may have an incidental effect on the petitioners' recreational use of the lake does not amount to a violation of the public trust doctrine." (emphasis supplied)

The Michigan case of *Hall v. Wantz,* supra, uses the analogy of a Vermont case to dispose of the arguments of the permanently anchoring businessman that since the

traveling public is convenienced by his services, he must be engaged in navigation. The Response appears on page 464:

> "In *Furlong v. Deringer, Inc.*, 111 Vt. 220, 13 A.2d 186, 187, the court in a like case granted injunctive relief and said: 'That the public is entitled to a proper viatic use of a highway is too well established to need argument or citation of authority. However, this fact does not avail the defendant in this case...It (defendant) is here *claiming right to occupy plaintiff's land (within the highway boundaries) for the purpose of conducting a busines for its private gain and profit.* It makes *an attempt to justify its claim upon the ground that the nature of its business is such that the travelling public is convenienced thereby.* This same argument may be used with equal force to one who sets up on another's land within highway limits a gas station, garage, restaurant and dozens of other business stands. Here the *defendant is attempting to take another's property for its private use against the will and without the consent of the owner.* This cannot be done. (Citing authorities)' " (Emphasis supplied)

Authorities are numerous for the proposition that the public right of navigation includes only a *temporary* right of anchorage as an incident necessary to the enjoyment of the right of navigation.

Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 (1942)

Kuramoto v. Hanoda, 30 Haw. 841 (1929)

Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953)

Patterson v. Dust, 190 Mich. 679, 157 N.W. 353 (1916)

West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973)

1 Fornhon, *Water and Water Rights*, Sec. 46 (1904)

People v. Kraemer, 164 N.Y.S. 423, 429 (1957):

"The harbor is located in a region in which there is a substantial amount of commercial traffic of a type that might utilize the harbor for purposes of navigation as, for example, to lay up overnight in the course of a journey through the Sound."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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